IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 18, 2005 Session

ALBERT ALLEN ARNOLD, ET AL. v. HENRY BOWMAN

Appeal from the Chancery Court for Rhea County
No. 9730 Buddy D. Perry, Judge

No. E2004-01151-COA-R3-CV - FILED JUNE 23, 2005

Albert Allen Arnold, in his capacity as trustee for Robert Ivens and Jackie West, and, in addition, Robert Ivens and Jackie West, individually ("the plaintiffs") filed the instant action against Henry Bowman ("the defendant"), claiming interests in real property ("the subject property") titled solely in the name of the defendant. In addition to that cause of action, Ivens asserted that he and the defendant had a dispute as to the location of the property line separating the subject property from another tract owned by Ivens. The trial court granted the defendant summary judgment as to all of the plaintiffs' claims. It subsequently conducted a bench trial on the defendant's counterclaim; in that counterclaim, the defendant had alleged that Arnold had, without the benefit of a license, acted as a real estate broker and received a fee in connection with the defendant's purchase of the subject property. The bench trial also addressed the defendant's request for Tenn. R. Civ. P. 11 sanctions. At the trial, these remaining issues were also found in favor of the defendant. The plaintiffs Arnold and Ivens appeal.[1] We affirm the trial court's grant of summary judgment to the defendant as to the appealing plaintiffs' claim that Ivens owns an interest in the subject property, but we vacate so much of the award of summary judgment as holds that Ivens' property line dispute is barred by the doctrines of *res judicata* and collateral estoppel. We affirm the trial court's judgment regarding the defendant's claim that Arnold acted as a real estate broker without a license, but reverse that portion of the judgment holding that Ivens is jointly and severally liable with Arnold for the statutory penalty assessed in response to Arnold's misconduct. Furthermore, we vacate the trial court's award of a Rule 11 sanction. We remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and D. MICHAEL SWINEY, JJ., joined.

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[1] Only Arnold and Ivens filed a notice of appeal. West did not appeal.

Howard L. Upchurch, Pikeville, Tennessee, for the appellants, Albert Allen Arnold, Trustee for Robert Ivens, and Robert Ivens, individually.

William J. Brown, Cleveland, Tennessee, for the appellee, Henry Bowman.

OPINION

I.

On October 5, 1995, the defendant purchased the subject property from the Lawson heirs. The defendant first learned that the property was available for sale when he met with Arnold about another matter. During that meeting, Arnold mentioned to the defendant that there was a piece of property, *i.e.*, the subject property, available for purchase, and that he, Arnold, believed there was enough timber on the land to cover the purchase price. Prior to this meeting, Arnold and West had become aware of the subject property. They conducted research as to its ownership and later located the owners. Arnold had initially expressed an interest in purchasing the property; it was later that he alerted the defendant about it. Arnold told the defendant that the price of the property was $57,000, but that he believed the land had enough harvestable timber to pay for the property.

The appealing plaintiffs contend that approximately four to six weeks prior to the Bowman/Lawson heirs closing, Arnold and West met with the defendant on the subject property to discuss the possibility of jointly developing it. Arnold acted as a trustee for Ivens. Arnold and Ivens had a trust relationship whereby Arnold would acquire real estate and develop or sell it for Ivens. The appealing plaintiffs contend that Arnold, West, and the defendant agreed that the defendant would purchase the subject property, pay for the surveyor, and then harvest and sell enough timber to recoup his total investment. According to them, it was agreed that, once the defendant had recouped his investment, the subject property would be owned by the defendant, West, and Ivens in equal shares. The appealing plaintiffs contend that the parties agreed that the defendant would take the deed from the Lawson heirs in his individual name since he was putting up all of the money. The interests of Ivens and West were never memorialized in a writing.

Since Arnold was to attend the closing, the defendant furnished him a cashier's check in the amount of $57,000 for the Lawson heirs. Arnold's attorney closed the sale. At the closing, the attorney produced a series of checks, one of which was payable to Arnold in the amount of $14,100. The defendant contends that he was unaware that Arnold had received any part of the payment made by him to the Lawson heirs. Arnold, on the other hand, contends that it was agreed among the parties that he would receive this amount, and that he would use these funds to develop the subject property.

After the sale of the subject property was closed, the defendant started harvesting the timber on the property. In 1997, however, a boundary line dispute arose between the defendant and Richard Kinzalow, trustee for the Richard Kinzalow Trust. Kinzalow alleged that some of the timber harvested by the defendant came from his property. Kinzalow's property is adjacent to the *west*

boundary line of the subject property. Kinzalow filed a complaint asking the trial court to, among other things, determine the boundary line between his parcel and the subject property. The defendant responded by arguing that he had secured a survey from Raymond D. Beavers ("the Beavers survey"); that the survey was correct; and that, as substantiated by the Beavers survey, the timber that he had harvested had all been on his property.

Kinzalow filed an amended complaint on April 18, 2000, joining Arnold, Ivens, and West as parties. He did so because of their claim that they had interests in the subject property. In their answer, the joined defendants – the plaintiffs in the instant action – claimed that although the defendant held the legal title to the subject property, he actually owned only a one-third interest in the property; and that Ivens and West each also owned a one-third interest. In a cross claim filed against the defendant, the plaintiffs asked the court to decree that they were equitable owners along with the defendant, and asked that a trust be imposed upon the property. The defendant responded to the cross claim by raising the statute of frauds as a defense, arguing that the plaintiffs' interests in the property were not memorialized in writing and were, therefore, unenforceable.

With the pleadings in the state as set forth in the preceding paragraph, Kinzalow and the defendant subsequently reached an agreement and jointly asked the court to dismiss Kinzalow's complaint. On December 12, 2001, the trial court entered an order providing that the defendant would convey to Kinzalow by quitclaim deed a 14 acre tract as outlined in the Beavers survey. The 14 acre tract was in the general vicinity of the *west* boundary of the subject property. The court adopted the Beavers survey as a "true, correct, and complete survey of the [subject property]." As to the cross claim brought by the plaintiffs, the trial court ordered the defendant to "diligently litigate to conclusion the interest, if any of Arnold, West and Ivens and [Kinzalow] takes subject to the finding of the court concerning that litigation." On June 18, 2002, the plaintiffs in the instant action took a nonsuit without prejudice with respect to their counterclaim against Kinzalow and their cross claim against the defendant.

The defendant subsequently scheduled an auction to sell a portion of the subject property. However, the day before the auction – on October 18, 2002 – the plaintiffs filed the complaint in the instant case and served a copy on the auctioneer. In the complaint, the plaintiffs claim that they own interests in the subject property. They aver, as they did in the Kinzalow matter, that the parties agreed that the defendant would hold record title for the use and benefit of himself, Ivens, and West. They ask the court to decree that Ivens and West are equitable owners, along with the defendant. They further ask the court to impose a constructive or resulting trust on the property. Ivens alleges that he had hired a licensed surveyor to survey the line between a tract that he owned and the subject property. The results of that survey, according to Ivens, suggest that the defendant was claiming a portion of Ivens' land. As a result, given the "confusion and uncertainty as to the true location of said boundary line[]," Ivens contended that if the defendant sold a portion of the subject property, he would probably be conveying a portion of Ivens' tract, thereby creating a cloud on Ivens' title.

Ivens' property is adjacent to the *east* boundary line of the subject property. The latter tract is large, containing approximately 339 acres[2], as reflected in the Beavers survey.

The defendant first responded by filing a motion to dismiss and for Tenn. R. Civ. P. 11 sanctions. Specifically, the defendant argued that Ivens' and West's claims that they each owned a one-third interest in the subject property was not supported by the evidence developed prior to trial; that their claims were "frivolous and without factual or legal basis"; that they were made for the purpose of extorting money from the defendant; and that the claims were intended to cast a cloud on the defendant's title at a time when a portion of the subject property was about to be sold at auction. The defendant subsequently filed an answer and counterclaim, in which he raised the defense of the statute of frauds based upon the fact that the plaintiffs were pursuing claims to real property that were not memorialized in writing. As to the boundary line issue raised by Ivens, the defendant argued that this issue had been litigated in the Kinzalow matter by the trial court's adoption of the Beavers survey. Consequently, according to the defendant, the Ivens' boundary line dispute was barred by the doctrines of *res judicata* and collateral estoppel. In his counterclaim, the defendant charged that Arnold received what amounted to a real estate broker's fee in the amount of $14,100, which amount was never disclosed to the defendant. Since Arnold was not a licensed real estate broker, the defendant argued that Arnold should be subject to the statutory penalty codified at Tenn. Code Ann. § 62-13-110(b) (Supp. 2004). The defendant further averred that, considering the relationship among Arnold, Ivens, and West, all should be jointly and severally liable for any Tenn. Code Ann. § 62-13-110(b) penalty imposed upon Arnold.

The defendant moved for summary judgment, arguing that he was entitled to a judgment on all issues. Following a hearing on that motion, the trial court granted the defendant partial summary judgment. By order entered May 13, 2003, the court held that the defendant was entitled to summary judgment on the plaintiffs' claim that they owned interests in the subject property, because, according to the trial court, such claims are barred by the statute of frauds. The trial court further held that the plaintiffs' claims of ownership could not be sustained under either of the theories of resulting or constructive trust. As to the boundary line dispute between Ivens and the defendant, the court held that the Beavers survey, adopted by the court in the Kinzalow matter, contained the metes and bounds of the boundary between the subject property and that of Ivens. Therefore, according to the trial court, *res judicata* and collateral estoppel would bar any further litigation pertaining to the location of the common line. However, with respect to (1) the defendant's counterclaim regarding his claim that Arnold had wrongfully acted as a real estate broker, and (2) the defendant's request for Rule 11 sanctions, the trial court held that there were disputed issues of material fact precluding a grant of summary judgment as to those issues.

A bench trial was conducted on February 23, 2004, at which both parties proffered the testimony of several witnesses. Among the witnesses called by the plaintiffs was Carl David Cunnyngham. Cunnyngham claimed that he was present and heard a conversation among the parties

[2]There is some confusion in the record as to the exact acreage of the subject property. Suffice it to say that the tract is a large one.

during which they discussed the matters alleged by the plaintiffs with respect to the ownership of the subject property. This conversation took place *after* the sale to the defendant.

At the conclusion of the hearing, the court made a finding of fact from the bench that Arnold acted as a broker. In its final judgment entered on April 20, 2004, the court held that Arnold received a fee or profit as a broker in the amount of $14,100. Consequently, a judgment was levied in the amount of $28,200 – being twice the commission received – pursuant to the provisions of Tenn. Code Ann. § 62-13-110(b). The court also held that Arnold acted as the agent for Ivens, and that West was a "partner" in the transaction such that all plaintiffs were jointly and severally liable for the penalty of $28,200. On the defendant's motion for Rule 11 sanctions, the trial court found that the plaintiffs' claims of interests in the subject property and Ivens' allegations concerning the boundary line between his property and the subject property were so legally and factually deficient as to warrant the imposition of a Rule 11 sanction. As a result, the trial court sanctioned the plaintiffs by awarding attorney's fees to the defendant. Arnold and Ivens filed a timely notice of appeal. West did not appeal.

II.

The appealing plaintiffs challenge both the court's decision to grant partial summary judgment to the defendant and the court's judgment following the bench trial. First, they contend that the trial court erred in granting partial summary judgment to the defendant because (1) the court should have established a constructive or resulting trust thus avoiding the bar of the statute of frauds, and (2) the boundary line between the subject property and Ivens' tract was not previously litigated, and, therefore, litigation about that issue was not barred by the doctrines of *res judicata* and collateral estoppel. In challenging the court's judgment following the bench trial, they argue that (1) Arnold did not act as a real estate broker and did not receive a commission because he simply assigned his interest as a potential purchaser of the property, and the money received was used for improvements on the subject property; (2) that Arnold was not an agent for Ivens such that Ivens should be jointly and severally liable for the statutory penalty; and (3) that the court's imposition of a Rule 11 sanction was improper given the fact that the plaintiffs conducted substantial investigation prior to filing suit. As these issues require different standards of review, we will address separately the trial court's decision on summary judgment and the judgment following the bench trial.

III.

A.

In determining whether summary judgment is appropriate, a court must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When determining whether or not there is a genuine issue of material fact, the trial court "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that

party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). A disputed fact is "material" if it must be decided to resolve the claim or defense at which the motion is directed. ***Id.*** at 215. Since a motion for summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993). In other words, we must decide anew if summary judgment is appropriate. In making this judgment, we review the precise record that was before the trial court and prompted the action of that court.

As previously noted, the appealing plaintiffs challenge the trial court's grant of partial summary judgment on two grounds. First, they argue that the trial court should have decreed a constructive or resulting trust, thereby avoiding the bar of the statute of frauds. Second, they contend that the dispute as to the boundary line between the subject property and the Ivens tract was not barred by *res judicata* or collateral estoppel. We will address each position in turn.

B.

The statute of frauds, codified at Tenn. Code Ann. § 29-2-101(a)(4) (2000), provides that

> [n]o action shall be brought:
>
> (4) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year;
>
> unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

It is undisputed that the plaintiffs' claims with respect to the subject property pertain to the "sale of land[]." Furthermore, it is clear and, again, undisputed that there is no written instrument memorializing the plaintiffs' alleged interests in the subject property. The only writing is the warranty deed to the property. It reflects the defendant as the sole grantee. Therefore, on the face of the record, the plaintiffs' claims are barred by the statute of frauds.

There are, however, a number of exceptions to the strict application of the statute of frauds. One of these is a factual scenario supporting a conclusion that the equitable remedy of a constructive trust or a resulting trust is appropriate. ***Sanderson v. Milligan***, 585 S.W.2d 573, 574 (Tenn. 1979). The plaintiffs rely upon this exception, arguing that, based upon the discussion among the plaintiffs and the defendant, it was agreed that the defendant would hold the record title for the use and benefit of himself, Ivens and West. "[A] trust may rest upon a parol agreement where the declaration of trust was made prior to or contemporaneous with a transfer, either by deed or by will, of an interest in realty." ***Id.*** Therefore, the plaintiffs argue that the lack of a written instrument is not fatal to their

claim. The plaintiffs urge us to hold that the trial court erred in failing to impose a constructive trust or a resulting trust on the subject property.

A constructive trust is one created in equity to satisfy the demands of justice. ***Rowlett v. Guthrie***, 867 S.W.2d 732, 734 (Tenn. Ct. App. 1993). It is imposed against one who

> by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal title to property which he ought not, in equity and good conscience hold and enjoy.

Livesay v. Keaton, 611 S.W.2d 581, 584 (Tenn. Ct. App. 1980). A court may impose a constructive trust in the following situations: (1) where a person procures the legal title in violation of some duty, express or implied to the true owner; (2) where title to property is obtained by fraud, duress, or other inequitable means; (3) where a person uses some relationship or influence to obtain legal title upon more advantageous terms than could be otherwise obtained; or (4) where a person acquires property knowing that another is entitled to its benefits. ***Tanner v. Tanner***, 698 S.W.2d 342, 345-46 (Tenn. 1985) (citation omitted). A trust must be shown by "clear, cogent and convincing" evidence. ***Myers v. Myers***, 891 S.W.2d 216, 220 (Tenn. Ct. App. 1994).

The defendant contends that a constructive trust cannot be imposed in a situation where the plaintiffs never had an interest in the property to begin with. He argues that the "constructive trust" scenarios contemplated in ***Tanner*** all presume that the individual who will benefit from the imposition of the trust had an interest in the property of which he or she is somehow being deprived. The defendant notes, correctly, that the plaintiffs do not allege fraud, duress or unconscionable conduct. Reduced to its essence, the plaintiffs' position is that the defendant violated an unwritten agreement when he did not convey a one-third interest in the subject property each to Ivens and West.

We agree with the trial court that a constructive trust is not appropriate in the instant case. The defendant paid for the property and title was placed in his name. The alleged interests of Ivens and West are not reflected in a written document. This is simply not a situation where one "obtained . . . the legal title to property which he ought not, in equity or in good conscience retain." ***Livesay***, 611 S.W.2d at 584. There is no basis for the imposition of a constructive trust in this case.

Although not addressed in great detail, the plaintiffs suggest, in the alternative, that the court should impose a resulting trust on the subject property. A resulting trust

> arises from the nature of circumstances of consideration involved in a transaction whereby one person thereby becomes invested with a legal title but is obligated in equity to hold his legal title for the

> benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and although there is an absence of fraud or constructive fraud.

Rowlett, 867 S.W.2d at 735 (quoting ***In re Estate of Roark***, 829 S.W.2d 688, 692 (Tenn. Ct. App. 1991)). The underlying basis for a resulting trust is consideration:

> That theory is that the payment of a valuable consideration draws to it the beneficial ownership; that a trust follows or goes with the real consideration, or results to him from whom the consideration actually comes; *that the owner of the money that pays for the property should be the owner of the property.*

Greene v. Greene, 272 S.W.2d 483, 487 (Tenn. Ct. App. 1954) (emphasis added). In the instant case, it is undisputed that the defendant used his own money in purchasing the subject property. None of the plaintiffs furnished any consideration. Consequently, a resulting trust is not shown by the facts of the instant case.

The plaintiffs argue there is a genuine issue of material fact that precludes a grant of summary judgment on the defendant's defense of the statute of frauds. They contend that the material fact in dispute is whether Ivens, West, and the defendant agreed to own the subject property in three equal shares. The plaintiffs contend that the defendant's only denial of their claim of such an agreement was a negative nod of the head during his deposition. This dispute, however, is not material to the legal issues presently under discussion. The fact that is material relative to the issue of the statute of frauds is undisputed – there is no writing memorializing the plaintiffs' alleged interests. Similarly, we find the same to be true of the trust issue – there is no evidence that any of the plaintiffs had an interest in the subject property that they were subsequently deprived of. Furthermore, there is no evidence that any of the plaintiffs furnished any consideration in connection with the purchase of the subject property. None of the *material* facts are in dispute. We affirm the trial court's grant of summary judgment on the defendant's position that the plaintiffs' claims of interests in the subject property are barred by the statute of frauds.

C.

The appealing plaintiffs next challenge the trial court's decision to grant summary judgment on Ivens' complaint that the defendant is wrongfully claiming an interest in property that belongs to him. In particular, Ivens argues that the boundary line dispute between the Ivens tract and the subject property was not resolved by the order entered in the Kinzalow matter. Therefore, so the argument goes, neither collateral estoppel nor *res judicata* can serve as a bar to Ivens' complaint. We agree with the plaintiffs on this issue.

Res judicata has the effect of barring a second suit between the same parties on the same cause of action with respect to all issues which were or could have been raised. ***Richardson v. Tenn. Bd. of Dentistry***, 913 S.W.2d 446, 459 (Tenn. 1995). To succeed on a *res judicata* defense, the moving party must demonstrate (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties were involved in both suits; (3) that the same cause of action was involved in both suits; and (4) that the underlying judgment was on the merits. ***Lee v. Hall***, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990). Collateral estoppel differs from *res judicata* in that in the former, although the parties are the same, the cause of action is different. ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987). Therefore, a party asserting collateral estoppel must not only show that the issue sought to be now litigated was, in fact, litigated in the earlier suit, but that it was essential to the judgment in that suit. ***Id.*** at 632 (citation omitted).

The complaint filed in the Kinzalow matter sought to establish the *west* property line of the subject property. The line in dispute in Ivens' claim pertains to the *east* property line of the subject property. The only reason the plaintiffs in the instant action were "pulled" into the Kinzalow litigation was simply because they claimed interests in the subject property. The defendant makes much of the fact that the trial court in the Kinzalow case approved the Beavers survey. That survey was of the approximately 339 acres of the subject property, but it also showed the *numerous* tracts – and their dimensions – which abut the subject property. One of these tracts is the one owned by Ivens; it adjoins the *east* boundary of the subject property. As is clear from the Beavers survey, the Ivens tract lies a substantial distance from the Kinzalow tract and was totally immaterial to the dispute between Kinzalow and the defendant. It is obvious to us that the trial court, in adopting the Beavers survey in the Kinzalow litigation, was only adopting it as to the line shared by Kinzalow and the defendant *and for no other purpose*. This was the only line at issue in that earlier litigation. Since that was the only line at issue in the litigation between Kinzalow and the defendant, there was no need for the trial court to decide any of the other boundaries that the defendant shared with his neighbors, including the line shared with Ivens. To the extent that the trial court in the Kinzalow matter identified boundary lines other than the one at issue between Kinzalow and the defendant, such determinations were not essential to the matter at issue in Kinzalow. *See* ***Massengill***, 738 S.W.2d at 632.

There was no judgment in the Kinzalow/defendant dispute that even remotely bears upon the dispute between the defendant and Ivens. Once the Kinzalow/defendant dispute was resolved by the trial court, the plaintiffs in the instant case, including Ivens, non-suited their cross claim against the defendant without prejudice. The Kinzalow litigation involved a different cause of action from that involved in the Ivens/defendant dispute in the instant case. *See* ***Lee***, 790 S.W.2d at 294. There is nothing about the resolution of the Kinzalow/defendant litigation that brings into play the doctrines of *res judicata* or collateral estoppel so as to bar the pursuit of the Ivens claim in the case at bar. Accordingly, we hold that the defendant is not entitled to summary judgment with respect to this claim. Therefore, it is necessary for us to vacate the trial court's award of summary judgment to the defendant on Ivens' property line dispute with him.

IV.

A.

The appealing plaintiffs also raise several issues pertaining to the matters reserved by the trial court for trial. They argue that the trial court (1) erred in holding that Arnold improperly acted as a real estate broker, thereby entitling the defendant to a penalty against Arnold under Tenn. Code Ann. § 62-13-110(b); (2) erred in holding that Ivens was jointly and severally liable with Arnold for the penalty; and (3) erred in levying a sanction against the plaintiffs pursuant to Tenn. R. Civ. P. 11.03. The trial court rendered its judgment on these issues following a bench trial. Therefore, we review the trial court's findings of fact *de novo*, according a presumption of correctness to those findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d). There is no presumption of correctness as to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996). Our review is impacted by the well-established principle that the trial court is in the best position to assess the credibility of witnesses; accordingly, we accord substantial weight to those determinations on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

B.

The plaintiffs challenge the trial court's holding that Arnold improperly acted as a "broker" in negotiating the sale of the subject property to the defendant, within the meaning of Tenn. Code Ann. § 62-13-102 (Supp. 2004).

Tenn. Code Ann. § 62-13-102(4)(A) defines a "broker" as

> any person who for a fee, commission, finders fee or any other valuable consideration, or with the intent or expectation of receiving the same from another, solicits, negotiates or attempts to solicit or negotiate the listing, sale, purchase, exchange, lease or option to buy, sell, rent or exchange for any real estate or of the improvements thereon or any time-share interval as defined in the Tennessee Time-Share Act, compiled in title 66, chapter 32, part 1, collects rents or attempts to collect rents, auctions or offers to auction, or who advertises or holds out as engaged in any of the foregoing;

Any person who attempts to perform or performs a single act enumerated above is deemed a broker. Tenn. Code. Ann. § 62-13-103 (1997). A person acting as a broker, who is not licensed as such, is subject to the penalty described in Tenn. Code Ann. § 62-13-110 (Supp. 2004). That statute provides, in pertinent part, that

> [a]ny person acting as a broker, affiliate broker, time-share salesperson or acquisition agent without first obtaining a license who

> has received any money, or the equivalent thereof, as a fee, commission, compensation or profit by or in consequence of a violation of any provision of this chapter, is, in addition, liable for a penalty of not less than the amount of the sum of money so received and not more than three (3) times the sum so received, as may be determined by the court, which penalty may be recovered in any court of competent jurisdiction by any person aggrieved.

Tenn. Code Ann. § 62-13-110(b). After holding that Arnold acted as a "broker," the trial court imposed a penalty of twice the fee earned from the sale, *i.e.*, $14,100. Thus, the penalty assessed by the trial court amounts to $28,200.

The appealing plaintiffs argue that Arnold did not solicit the defendant to sell the subject property to him; rather, according to the plaintiffs, the defendant approached Arnold about timber and Arnold merely informed him that the subject property was available. Since Arnold located the subject property and had already made an agreement to acquire it, Arnold, in the words of the plaintiffs, merely "assigned his interest as a purchaser or potential purchaser in [sic] the property." They also argue that the $14,100 received by Arnold – which the trial court categorized as a brokerage fee – was used to develop the property pursuant to an agreement with the defendant. The plaintiffs also argue that the defendant did not suffer any loss as a result of Arnold's conduct and, therefore, should not be entitled to the statutory penalty.

First, we must determine if the evidence preponderates against the trial court's judgment that Arnold acted as a "broker." We find that it does not. A "broker" has been defined generally as a person who expects to receive some form of consideration from another for his or her efforts in soliciting or negotiating the sale or purchase of real estate. ***Bowden Bldg. Corp. v. Tenn. Real Estate Comm'n***, 15 S.W.3d 434, 440 (Tenn. Ct. App. 1999). Arnold testified that he did not solicit the defendant. However, it is clear that Arnold negotiated with the Lawson heirs; was later involved in discussions with the defendant; made arrangements for the closing; retained an attorney to handle the closing; and attended the closing. The defendant never met the Lawson heirs. The trial court obviously accredited the evidence showing all of this. This being the case, we cannot say that the evidence preponderates against a finding that Arnold acted as a broker in the transaction wherein the defendant purchased the subject property from the Lawson heirs.

We further find that the evidence does not preponderate against the trial court's finding that the amount received by Arnold constitutes a "fee" within the meaning of Tenn. Code Ann. §§ 62-13-102(4)(A) and 62-13-110(b). The defendant testified that Arnold informed him that the subject property could be purchased for $57,000. He further testified that he was never advised by Arnold or anyone else that Arnold would be receiving compensation in connection with the defendant's purchase of the subject property. It is a fair assumption from all of this that the Lawson heirs were willing to sell the subject property for a net of $42,900, *i.e.*, the $57,000 paid by the defendant less than $14,100 paid at the closing to Arnold. Therefore, it is arguable that the defendant was misinformed by Arnold as to the actual cost of the property.

Arnold testified that he received a check for $14,100 in connection with the closing of the transaction; he claims that this money was to be invested in developing the subject property. He further contends that all of the money was actually used to cover the cost of, among other things, moving heavy machinery, building a road on the property, and paying for gas, equipment use, and maintenance. However, Arnold had no documentation to show how the money was spent. Additionally, the evidence presented at trial reveals that, in his deposition, Arnold categorized the $14,100 as "profit." The plaintiffs rely upon the defendant's testimony to the effect that he "might have give [sic] [Arnold] something."

In its final decree, the trial court stated that

> Albert Allen Arnold acted as a broker as that term is defined in [Tenn. Code Ann. § 62-13-102] and that he received as a fee or profit the sum of $14,100.00 in the course of the transaction as was admitted by him in his deposition and clearly identified by a check identified in the course of his deposition. The court is further convinced that [Arnold] was acting fraudulently and willfully in the course of the transaction because he failed to disclose the actual purchase price to any of the parties . . . nor did he disclose that he was to receive any compensation in the transaction to them.

We hold that the evidence does not preponderate against the trial court's conclusion that the $14,100 received by Arnold was a "fee" within the meaning of the statute.

Having determined that the trial court did not err in holding that Arnold acted as a "broker," we hold that the court's calculation and award of the statutory penalty described in Tenn. Code Ann. § 62-13-110(b) was proper. The appealing plaintiffs argue that the defendant is not entitled to the penalty because, according to them, he did not suffer a loss in the transaction. However, as the trial court noted, a complaint for violation of the statutory scheme may be brought by "any person aggrieved." Tenn. Code Ann. § 62-13-110(b). The defendant, as the purchaser of the subject property, was aggrieved in that he probably paid more than the Lawson heirs would have been willing to take, had Arnold not extracted his fee. We find no error in the award of the penalty to the defendant.

C.

The plaintiffs also challenge the trial court's holding that Ivens was jointly and severally liable for the $28,200 penalty assessed against Arnold.

The trial court held Ivens jointly and severally liable for the penalty levied against Arnold. The court noted as follows:

> The court makes specific note of the style of the original complaint and various allegations contained therein where the original plaintiffs presented to the court the statement that [Arnold] was their "trustee". The court further takes specific note that in the course of his deposition and his trial testimony that Robert Ivens specifically testified that [Arnold] had authority to act and was acting on his behalf not only in this transaction but in many others, and that he had the authority to control and manage the transactions that Arnold performed on his behalf. He further testified in his deposition that he was due a portion of the money that [Arnold] received. The court is satisfied that [Arnold] was the agent of Robert Ivens and that Robert Ivens should be jointly and [severally] liable for the penalties assigned to [Arnold] . . .

The Tennessee Real Estate Broker License Act of 1973 was created to "protect the public from irresponsible or unscrupulous persons dealing in real estate." ***Business Brokerage Ctr. v. Dixon***, 879 S.W.2d 1, 3 (Tenn. 1994). In furthering this purpose, the act requires individuals dealing in real estate to obtain a license. *See* Tenn. Code Ann. § 62-13-301 (Supp. 2004). A person who fails to comply with this requirement prior to acting as a "broker" commits a Class B misdemeanor and is subject to a fine. *See* Tenn. Code Ann. § 62-13-110(a)(1). As previously discussed, we find that the evidence does not preponderate against the trial court's judgment that Arnold, as one who "for a fee, commission, finders fee or any other valuable consideration . . . solicit[ed], negotiate[ed] or attempt[ed] to solicit or negotiate" the sale of land, acted as a "broker." Tenn. Code Ann. § 62-13-102(4)(A). However, we find that the evidence preponderates against the trial court's judgment that based upon their trust relationship, Ivens was also liable under this statute.

Ivens testified that Arnold was his "trustee" – that Arnold would find property for him, and enter into agreements on his behalf. He further testified that Arnold acted on his behalf in negotiating the transaction for the sale of the subject property. However, the evidence does not support a finding that Ivens engaged in conduct specifically prohibited by the statute or was even aware that Arnold was engaging in such conduct. The record before us demonstrates the following with respect to Ivens' involvement in the sale of the subject property: he was not directly involved in the negotiations concerning the sale of the property; when Arnold contacted him about this deal, title had not yet been transferred but the transaction was otherwise essentially complete; he was not aware that Arnold had received a fee until after the lawsuit was filed; and he did not receive any portion of the fee. Therefore, we cannot find evidence that Ivens engaged in or ratified Arnold's improper conduct.

The trial court relied, in part, on Ivens' deposition testimony in which, according to the court, Ivens stated that he was due a portion of the money that Arnold received. In that deposition, Ivens actually testified that he was "somewhat" disappointed upon learning that Arnold had made $14,100

from the sale of the property because he believed he should have received a portion of that money. Earlier in his deposition, however, he testified as follows:

> Q: So if [Arnold] sells some property – buys some property and sells some property, you're supposed to get your cut right off the bat.
>
> * * *
>
> A: I would get – the money would come to me. In the dealings that I have had with [Arnold] I would spend the money to start with. Then I would get the money, not Albert. Except this case was different because of the timber.
>
> Q: Well, in this case [Arnold] made $14,000 off of this.
>
> A: I expect he needed something to live on.
>
> Q: But that was your money.
>
> A: Well, I guess part of it was.
>
> Q: And he didn't give it to you.
>
> A: Seems that way.

The testimony supports a finding that a principal-agent relationship existed between Arnold and Ivens. *See* ***Security Fed. Sav. & Loan Assoc. of Nashville v. Riviera, Ltd.***, 856 S.W.2d 709, 715 (Tenn. Ct. App. 1992)(defining an agent as "[o]ne who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it."). However, we cannot find that such a relationship automatically makes one liable for another's misconduct, particularly when the former is unaware that the other was engaging in conduct that would subject him or her to a penalty. Simply stated, the evidence preponderates against the trial court's judgment that Ivens is jointly and severally liable with Arnold for the statutory penalty assessed by the trial court.

D.

The plaintiffs' final argument concerns the trial court's imposition of a sanction for violations of Tenn. R. Civ. P. 11.02,[3] pursuant to Tenn. R. Civ. 11.03. The trial court imposed a sanction against the plaintiffs on the ground that they had no factual or legal basis for their claims of an interest in the subject property, and because the Ivens' boundary line dispute had been effectively resolved in the earlier Kinzalow litigation.

We review a trial court's decision to impose a Rule 11 sanction under an abuse of discretion standard. ***Krug v. Krug***, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992). A trial court abuses its discretion when its judgment has no basis in law or in fact, and is therefore arbitrary, illogical, or unconscionable. ***State v. Brown & Williamson Tobacco Corp.***, 18 S.W.3d 186, 191 (Tenn. 2000). In the instant case, a partial basis for the trial court's decision to award a Rule 11 sanction was its legally-incorrect determination that the defendant was entitled to summary judgment on the Ivens' boundary line dispute claim. Because of this, we conclude that the trial court's resolution of the defendant's Rule 11 request was premature. Accordingly, we vacate the trial court's award of a Rule 11 sanction. The defendant's motion for Rule 11 sanctions can be addressed by the trial court following the completion of a further hearing on remand.

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[3] Tenn. R. Civ. P. 11.02 provides as follows:

> By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,---
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

V.

The judgment of the trial court is affirmed in part, reversed in part, and vacated in part. We hold that summary judgment was proper with respect to the defense of the statute of frauds and the constructive trust and resulting trust issues. With respect to the boundary line dispute between Ivens and the defendant, however, we hold that summary judgment was not appropriate. Accordingly, we vacate that portion of the trial court's summary judgment. We affirm the trial court's judgment that Arnold acted as a broker without the benefit of a real estate license and that, consequently, he is liable for the penalty assessed by the trial court pursuant to the provisions of Tenn. Code Ann. § 62-13-110(b). However, we find that the evidence preponderates against the trial court's judgment that Ivens is jointly and severally liable with Arnold for the penalty, and reverse the trial court's judgment so holding. With regard to the sanction levied pursuant to Tenn. R. Civ. P. 11.03, we vacate the trial court's judgment. This matter is remanded to the trial court for further proceedings consistent with this opinion. Exercising our discretion, we tax the costs on appeal to the appellants, Albert Allen Arnold and Robert Ivens.

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CHARLES D. SUSANO, JR., JUDGE